Nos. 97-836 and 97-839

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In The

# Supreme Court of the United States

October Term, 1997

STATE OF NORTH CAROLINA,

*Petitioner,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,

*Respondent.*

ROANOKE RIVER BASIN ASSOCIATION,

*Petitioner,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## AMICUS CURIAE BRIEF OF THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF RESPONDENT

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## AMICUS CURIAE BRIEF OF THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF RESPONDENT

The Commonwealth of Virginia, *amicus curiae* below, submits this brief in opposition to the petitions for writ of certiorari filed by the State of North Carolina and the Roanoke River Basin Association.

## INTEREST OF AMICUS

The public water supply project at issue in this case is located entirely within the Commonwealth of Virginia. The City of Virginia Beach applied for and the Virginia State Water Control Board granted a Clean Water Act (CWA) § 401 certification for this public water supply project in 1983; the certification authorizes the discharge of construction materials into Lake Gaston to build the City's water intake. North Carolina now seeks to invalidate that certification. Virginia participates here to defend its § 401 authority and the validity of its certification, and to protect its traditional authority, specifically preserved in CWA § 101(g), 33 U.S.C. § 1251(g), "to allocate quantities of water within its jurisdiction" to meet those vital public water supply needs.

Virginia also is vitally interested in the safety and adequacy of public water supplies for its citizens, businesses, and the critical U.S. military facilities in southeastern Virginia. The Virginia General Assembly has allocated 60 million gallons of water per day ("60 mgd") from the flow of the Roanoke River in the Commonwealth to public water supplies for Virginia Beach and

other communities in southeastern Virginia. 1992 Va. Acts, Ch. 812, Enactment 3 (at page 1305). North Carolina's assertion of § 401 authority over Virginia Beach's project is a direct attack upon Virginia's authority and upon its allocation of water within the Commonwealth.

Virginia Beach's Lake Gaston pipeline project and earlier, similar proposals have been studied, in incredible and redundant detail, for *more than twenty years*. Those studies have concluded *unanimously* that the project is needed, that it will have *no* significant environmental impacts, and that it is the best (and probably only) available project to meet current and projected public water supply needs. The administrative and judicial record flatly contradicts North Carolina's obstructive and disingenuous contention that the project threatens water quality in the lower Roanoke River.

The pipeline project is complete and operational. A decision now to give North Carolina a § 401 veto would lead to a public water supply crisis throughout southeastern Virginia, an area that is home to nearly one million people, to port facilities that are critical to the national economy, and to the largest naval complex in the entire free world – all of which depend on local public water supplies. It also would work an utterly useless and indefensible forfeiture of $150 million of municipal funds that the Cities of Virginia Beach and Chesapeake have spent to build the pipeline project; and it would force Virginia Beach and Chesapeake "back to the drawing board," after fifteen years spent obtaining and defending the necessary permits for the project, leaving them with *no* viable alternative water source anywhere in view. That

result would be especially unconscionable in view of the fact that North Carolina asserted the § 401 claim that it presses here for the *first time* in *1994*, as an act of desperation, after it had opposed Virginia Beach's project for nearly *eleven years* and lost at every step of the way (*see* n.7, *infra*); and in view of the fact that North Carolina's opposition is motivated by the sort of abject parochialism that Congress sought to avoid by including subsection (a)(2) in § 401. Virginia participates as *amicus* in an effort to prevent this drastic harm to the important public interests that are served by the Lake Gaston pipeline.

## BACKGROUND

The Court of Appeals for the Fourth Circuit summarized the background of this case, in part, in *North Carolina v. City of Virginia Beach*, 951 F.2d 596, 598-99 (4th Cir. 1991):

> Although the City of Virginia Beach, which is the most populous city in the State of Virginia, borders the lower Chesapeake Bay and the Atlantic Ocean, it has for many years suffered from fresh water shortages. At various times in the past decade, water-use restrictions and water rationing have been imposed, and with the unexpectedly rapid population growth of the Virginia Beach community, the shortage grows more severe. Virginia Beach does not have a water supply of its own, and it has had to purchase its water from the City of Norfolk under a contract that obligates Norfolk only to provide Virginia Beach with "surplus" water

> . . . . After exploring various options for alleviating the problem, such as desalination of sea water and wastewater reuse, Virginia Beach concluded that the best solution was to draw water through a pipeline from Lake Gaston. [Footnote omitted.]

Lake Gaston is a FERC-licensed hydropower project owned by Virginia Electric and Power Company (a/k/a VEPCO or Virginia Power), and was created by construction of a dam on the Roanoke River. It lies immediately downstream of the federal Kerr Reservoir, which is "the largest of the three lakes and is the primary storage facility in the system." *North Carolina v. Hudson*, 731 F. Supp. 1261, 1264 (E.D.N.C. 1990), *aff'd, Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58 (4th Cir. 1991), *cert. denied*, 502 U.S. 1092 (1992). Roanoke Rapids Reservoir, another VEPCO facility, lies immediately below Lake Gaston. Below Roanoke Rapids, the River flows 138 miles through Piedmont and coastal North Carolina and into Albemarle Sound.

The Virginia State Water Control Board's § 401 certification limits Virginia Beach's water withdrawals from Lake Gaston to a maximum of 60 mgd. Sixty mgd is a mere 1.2 percent of the average flow of the Roanoke River. Virginia Beach's § 404 permit[1] and VEPCO's FERC

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[1] *See* 33 U.S.C. § 1344. Virginia Beach's § 404 permit was affirmed after eight long years of litigation brought by the State of North Carolina and the Roanoke River Basin Association, petitioners here. *See State of North Carolina v. Hudson*, 665 F. Supp. 428 (E.D.N.C. 1987) (*Hudson I*), and 731 F. Supp. 1261 (E.D.N.C. 1990) (*Hudson II*), *aff'd, Roanoke River Basin Ass'n v. Hudson* (*Hudson III*), 940 F.2d 58 (4th Cir. 1991), *cert. denied*, 502 U.S. 1092 (1992).

license amendment (the action challenged here) both preclude the City's withdrawals from ever causing a reduction of the instantaneous minimum reservoir releases mandated by VEPCO's current or future FERC license. Those instantaneous minimum releases are a key datum used by North Carolina in issuing pollution discharge permits, and continued maintenance of the instantaneous minimum releases assures protection of water quality in the lower Roanoke River, including compliance with North Carolina's water quality standards (assuming, of course, that North Carolina does not allow more pollution than the River can bear). *See North Carolina v. Hudson (Hudson I)*: "in regulating water quality through the National Pollution Discharge Elimination System, North Carolina determines the maximum pollutant discharges allowable by industries and municipalities in the river based on FERC regulated minimum flows. . . . "; Secretary of Commerce Decision and Findings, Mat 19, 1994, DA 1727: "pollution discharge permits are keyed to minimum flows, and VEPCO's minimum flows will not be affected by the City's project. . . . A 1978 [North Carolina North Carolina Division of Environmental Management] study reported that 'the potential for overall development, fishery maintenance, and *water quality conditions* on the lower Roanoke River are *directly related to the minimum flow requirements*'" (emphases added).[2]

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[2] "DA" citations are to the "Deferred [Joint] Appendix" filed by the parties in the Court of Appeals.

## ARGUMENT

This case comes at (or at least near) the end of a protracted State-*versus*-State battle over the use of a common resource – a river whose watershed is mostly in Virginia, but which flows to the ocean through North Carolina. The Petitions for *Certiorari*, however, attempt to obscure or conceal what really is at stake, by pretending that the issue is "State-*versus*-Federal" when in fact the real controversy is between two States.[3]

This Court has seen other such battles over inter-basin water transfers to supply the growing needs of our great coastal population centers. *See New Jersey v. New York*, 283 U.S. 336 (1931) (water supplies for New York City from the Delaware River); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931) (water supplies for Boston from the Connecticut River basin). The applicable law has long been settled: such inter-State disputes are governed by the principle of "equitable apportionment." As the

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[3] In the Court of Appeals a number of other states filed *amicus* briefs in support of North Carolina. Some may do so in this Court. These states were apparently misled into believing that this dispute is one between a state and a federal agency such as that recently decided by the United States Court of Appeals for the Second Circuit in *American Rivers, Inc. v. FERC* (Docket Nos. 96-4110(L), et al. – November 5, 1997), 1997 U.S. App. Lexis 30372. Nothing could be further from the truth. The Commonwealth, which takes second place to no state in protecting its sovereignty from interference of any sort, has no quarrel with the *American Rivers* decision that FERC cannot simply reject conditions imposed by a state under Section 401 of the CWA. The present case, however, does not present that issue. The case is a bald effort by North Carolina to misuse the CWA to intrude into the internal affairs of Virginia.

Court has stated repeatedly, beginning with the decision which first established that principle, interstate rivers must be shared; there must be an "equitable apportionment of benefits between the two states resulting from the flow of the river." *Kansas v. Colorado*, 206 U.S. 46, 118 (1907).

Justice Holmes, writing for a unanimous Court (with two Justices not participating), described the equitable apportionment principle and the necessity that gave rise to it in *New Jersey v. New York*, 283 U.S. at 342-43:

> A river is more than an amenity, it is a treasure. It offers *a necessity of life that must be rationed among those who have power over it.* New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand *equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished.* Both States have real and substantial interests in the River that must be reconciled as best they may be . . . [T]he effort always is to secure an equitable apportionment without quibbling over formulas. [Emphases added.]

*See also, e.g., Colorado v. Kansas*, 320 U.S. 383, 393 (1943): "The lower State is not entitled to have the stream flow as it would in nature regardless of need or use."

In making equitable apportionments of the benefits of interstate rivers, the Court has recognized repeatedly that public water supply for human consumption is "the

most beneficial use" available. *New Jersey v. New York*, 283 U.S. at 343.[4]

- "Drinking and other domestic purposes are the highest uses of water. An ample supply of wholesome water is essential". *Connecticut v. Massachusetts*, 282 U.S. at 673.

- "In *Connecticut v. Massachusetts* we declined to enjoin Massachusetts' proposed diversion for future uses. We took into account the impending 'serious water shortage' in the Boston area and the absence of 'real or substantial injury or damage' to Connecticut." *Colorado v. New Mexico*, 459 U.S. 176, 187 n.12 (1982).

- In the context "of a proposed diversion in one State to satisfy a demonstrable need for a potable supply of drinking water[,] . . . the compelling nature of the proposed use reduces the speculation that might otherwise attend assessment of the benefits of a proposed diversion." *Colorado v. New Mexico*, 459 U.S. at 193-94 (O'Connor, J., concurring in the judgment).

Congress manifestly did not alter or pre-empt this pre-existing body of law by enacting the CWA, and to our knowledge no party has ever contended that it did. To the

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[4] The quoted statement is in the Court's discussion of a New Jersey argument that mirrors North Carolina's one consistent complaint against the Lake Gaston pipeline, that it is an "interbasin transfer" and therefore permanently reduces the River's flow by the amount of the withdrawals. In *New Jersey v. New York*, the Court answered that argument in this way: "The removal of water to a different watershed obviously must be allowed at times unless States are to be deprived of the most beneficial use on formal grounds. . . . " *See also Connecticut v. Massachusetts*, 282 U.S. at 669-71.

contrary, Congress *expressly preserved* each State's existing jurisdiction and authority to allocate its water resources among competing users, from *any* encroachment under the CWA. It did this first in its statement of policies and purposes, in CWA § 101(g), 33 U.S.C. § 1251(g):

> It is the policy of Congress that *the authority of each State to allocate quantities of water within its jurisdiction* shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate *rights to quantities of water which have been established by any State.* [Emphases added.][5]

Congress reiterated this principle in CWA § 510(2), 33 U.S.C. § 1370: "Except as expressly provided in this Act, nothing in this Act shall . . . (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." As the Court stated in *P.U.D. No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511

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[5] The policy stated in § 101(g), which was added to the CWA in 1977, also is reflected in § 101(b), 33 U.S.C. § 1251(b), which states "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the *development and use* (including restoration, preservation, and enhancement) of land and *water resources*." (Emphases added.) Section 101(g) speaks more specifically to the preservation of the States' existing authority to "allocate quantities of water" and to establish "rights to quantities of water" within their jurisdiction – as Virginia has done in this instance. *See* 1977 legislative history, *quoted in P.U.D. No. 1*, 511 U.S. at 721: "It is the purpose of this amendment to insure that State [water] allocation systems are not subverted. . . . "

U.S. 700, 720 (1994): "Sections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users."

Congress also tailored § 401 carefully to preserve each State's authority over its own water resources and to prevent possible abuses of the certification power. Indeed, Congress very likely foresaw the risk that downstream States might misinterpret or attempt to misuse their § 401 certification authority to seize power over their neighbors' resources, or as a weapon in interstate competition for business, industry, and the like,[6] and it

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[6] North Carolina's opposition to Virginia Beach's project has been fueled by economic rivalry from its inception. Before 1983, North Carolina's environmental experts admitted repeatedly that Lake Gaston withdrawals would not harm downstream areas. North Carolina officials have even admitted, on occasion, that their primary concern is not environmental protection but preservation of 100% of the River's water for some undefined potential future uses in North Carolina. In a June 13, 1992, U.S. Department of Commerce public hearing (*see* n.7, *infra*), for example, North Carolina's Governor argued at length that the project should not be allowed on the ground (which every responsible federal agency has rejected) that "[t]he citizens in this area would be deprived of possible jobs and increased income that follows industrial development if our water resource is pilfered by our neighbors." Hearing transcript at 163. *See also, e.g., Hudson III*, 940 F.2d at 66: "North Carolina's objection appears to be that if Virginia Beach builds the pipeline, then 60 million gallons of water a day will be unavailable for future use in North Carolina at some point in the far future"; *North Carolina v. Virginia Beach*, 951 F.2d, at 598: "North Carolina and the Roanoke River Basin Association . . . oppose the proposed diversion of water from the Roanoke River Basin, because they argue it will create a potential shortage there and stifle future development in the basin."

enacted § 401(a)(2) specifically to protect both upstream and downstream States from possible abuses by their neighbors.

Section 401(a)(2) does not give any State a certification or veto power over activities in other States, as North Carolina seeks in this case. Instead, it interposes a neutral federal arbiter, the Administrator of the U.S. EPA, to referee interstate conflicts over federally-regulated discharges affecting interstate waterways. Section 401(a)(2) provides, in part, that whenever the Administrator determines that a discharge which originates in one State "may affect . . . the quality of the waters of any other State," that other State may object to the issuance of a federal permit, thereby requiring the federal licensing or permitting agency (such as FERC or the Corps of Engineers) to hold a public hearing. The licensing agency then must either "condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements" or deny the permit. 33 U.S.C. § 1341(a)(2). *See Arkansas v. Oklahoma*, 503 U.S. 91, 103 (1992): "Section 401(a)(2) appears to prohibit the issuance of any federal license or permit over the objection of an affected State unless compliance with the affected State's water quality requirements can be ensured." *Cf. id.*, at 104-07 (upholding an EPA regulation requiring "compliance with the applicable water quality requirements of all affected States" as a reasonable interpretation of § 401).

Section 401 thus employs different methods to protect water quality, depending on the locus of the discharge: An "originating" State's traditional jurisdiction over its own resources is preserved by the requirement

that it certify compliance with its water quality standards. "Affected" downstream States acquire no jurisdiction over other States' resources, but they may object to activities in other States and appeal to the federal government to intervene – precisely as they should do, in a federal system.

North Carolina understands quite well that its remedy, if any, is under § 401(a)(2). It invoked that remedy in 1983, but EPA frustrated that effort by declining to make the necessary finding that the project "may affect" water quality in North Carolina.

North Carolina's current theory, that Virginia Beach's withdrawals will result in a "new discharge" at the Gaston and Roanoke Rapids Dams, which "originates" in North Carolina, is contrary to the facts of this case (*see Virginia Electric and Power Company*, 77 F.E.R.C. ¶ 61,138, at 61,519-20 (1996), *reprinted in* North Carolina's Petition for *Certiorari* at 118a-122a). That theory also would swallow § 401(a)(2) and render it useless. As FERC stated (*id.*, at 61,521-22, North Carolina Petition at 127a), North Carolina argues that it "can control *any* alteration in the amount of water it receives from an upstream state," and it seeks to use the CWA "to frustrate the ability of an upstream state to allocate in-state water to meet public consumptive needs within that upstream state."

Section 401(a)(1) unambiguously commands the result reached by the Court of Appeals. Petitioners argue at length that the Court of Appeals erred by giving the word "discharge" its plain meaning of "addition," but they ignore the context in which the word appears. Section 401(a)(1) requires the originating State's certification

for federally licensed activities "which may result in any discharge *into the navigable waters*." 33 U.S.C. § 1341(a) (emphasis added). Petitioners have not explained how a "discharge into" navigable waters can be accomplished *without* adding something to those waters.

There can be no reasonable doubt that *any* discharges into the navigable waters that may result from Virginia Beach's project originate in Virginia. Indeed, the *only* such discharge is the City's discharge of construction materials into Lake Gaston. But the same would be true even if petitioners correctly argued that an "altered discharge" of water through a dam is a "new discharge" and requires a new certification. The "altered discharge" undeniably "originates" in Virginia, the locus of the water intake that causes the "alteration."

In *P.U.D. No. 1*, 511 U.S. 700, the Court addressed the scope of the States' certification authority under §§ 401(a) and 401(d). That case, however, presented no issue of whether § 401 applied, which of two or more competing States had certification authority, or the effect of § 401(a)(2). *See id.* at 711. The Court addressed those issues in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987); and until North Carolina belatedly (in 1994) concocted the § 401 theory that it presses here,[7] it appeared that *Ouellette* had settled the matter.

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[7] Since 1983, North Carolina has opposed Virginia Beach's proposal by virtually every conceivable means (and its leaders have frequently proclaimed to its people that they were doing so). Yet in the nine years (1982-1991) consumed by the § 404 permit process and the *Hudson* litigation, North Carolina never suggested that it had *any* § 401 certification authority over the project. Virginia Beach and VEPCO initiated pre-application

In *Ouellette* the Court expressly recognized that where a discharge originates in one State but may affect water quality in another (as allegedly is the case here), the affected State is protected by § 401(a)(2) but not by § 401(a)(1). *See* 479 U.S. at 490:

> While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source (the affected States). Even though it may be harmed by the discharges, *the affected State only has an advisory role* in regulating pollution that originates beyond its borders. Before a federal permit may be issued, each affected State is given

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consultation for the FERC license amendment in early 1990 and filed a formal application in February 1991. North Carolina promptly objected under the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(A), preventing a FERC approval (pending an appeal to the U.S. Secretary of Commerce, *see id.*) and stalling the FERC process for nearly three years. The Secretary of Commerce ultimately reversed North Carolina's objection and removed the obstacle to FERC approval of the pipeline project, after concluding, *inter alia*, that **"the project meets the requirements of the Clean Water Act"** (Secretary of Commerce Decision and Findings, DA 1667 (emphasis in original); *see North Carolina v. Brown*, 42 E.R.C. 1255, 1258 n.3 (D.D.C. 1995)) – as the Secretary *must* do, before reversing a State CZMA objection to a federal license or permit. *See* 15 C.F.R. § 930.121(c). North Carolina sued to set aside the Secretary's decision (*see North Carolina v. Brown, supra*); but it did not claim at *any* time in the entire CZMA ordeal that the City's project (or the VEPCO license amendment) required its certification under the CWA. It made that claim for the *first time* in a motion filed with FERC in May 1994 – nearly eleven years after it first opposed Virginia Beach's project, and more than three years after the FERC application was filed.

> notice and the opportunity to object to the proposed standards at a public hearing. 33 U.S.C. § 1341(a)(2). . . . Significantly, however, *an affected State does not have the authority to block the issuance of the permit*. . . . An affected State's only recourse is to apply to the EPA Administrator, who then has the discretion to disapprove the permit if he concludes that the discharges will have an undue impact on interstate waters. . . . Thus the Act makes it clear that affected States occupy a subordinate position to source States in the federal regulatory program. [Emphases added.]

The Court also explained that Congress chose this regulatory scheme in order to avoid exactly the sort of interstate conflict presented by this case: "For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states." 479 U.S. at 496, *quoting Illinois v. Milwaukee*, 731 F.2d 403, 414 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985). The Court concluded:

> It is unlikely – to say the least – that Congress intended to establish such a chaotic regulatory structure.
>
> *Nothing in the Act gives each affected State this power to regulate discharges*. The CWA carefully defines the role of both the source and affected States, and specifically provides for a process whereby their interests will be considered and balanced by the source State and the EPA. This delineation of authority represents Congress' considered judgment as to the best method of serving the public interest and reconciling the

> often competing concerns of those affected by the pollution.

*Id.* at 497 (emphasis added).

The language that Congress chose to effectuate its intent is clear. Section 401 requires certification *only* from the State where the activity occurs that "originates" a "discharge into the navigable waters" (the "source" State). Downstream "affected" States are protected by § 401(a)(2), with the intervention of the EPA as a neutral federal arbiter. In this case, Virginia Beach's water supply intake in Virginia is the "origin" of any arguable discharge, change in discharge, or reduction of discharge; and *only* Virginia has § 401(a)(1) certification authority. North Carolina is protected by § 401(a)(2). North Carolina has pursued that course, and, as contemplated by the statute, the EPA as neutral federal arbiter has refused to find that water quality in North Carolina will be affected by Virginia Beach's project in Virginia. Section 401 is satisfied.

## CONCLUSION

North Carolina is trying to misuse § 401 to take away Virginia's "authority . . . to allocate quantities of water within its jurisdiction" – *i.e.*, in Virginia, and within its equitable share of the Roanoke River – and to seize that authority for itself, contrary to the express command of CWA § 101(g). Indeed, North Carolina's fundamental argument – that the "discharge" resulting from Virginia Beach's project is the *reduction in flow* through the

downstream dams – is a *direct attack* on Virginia's authority to allocate quantities of water within its jurisdiction.

North Carolina contends implicitly that *regardless* of whether it could establish in an equitable apportionment action that it (and not Virginia) has jurisdiction to allocate the disputed 1.2% of the River's flow among competing users (which appears highly unlikely, perhaps accounting for North Carolina's failure to bring such a claim), its § 401 authority supersedes and abrogates Virginia's authority to allocate quantities of water within Virginia. In fact, acceptance of North Carolina's argument in this case would allow it to use § 401(a)(1), contrary to §§ 101(g), 510(2), *and* 401(a)(2), to negate a Virginia statute (1992 Va. Acts, Ch. 812, Enactment 3, *reprinted as* Addendum 1) that "allocate[s] quantities of water within its jurisdiction" for public water supplies in southeastern Virginia.[8]

Section 401(a)(2) serves North Carolina's interest in protecting its water quality from adverse impacts of activities upstream in Virginia. North Carolina has no legitimate need to torture § 401(a)(1) to serve that interest, and its only apparent reason for doing so is to seize control of water in Virginia. Virginia, on the other hand, can look *only* to § 401(a)(1) for protection against adverse water quality impacts of activities licensed or permitted

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[8] In Enactment 3, the Virginia General Assembly expressly "allocated" 60 mgd "from the flow of the waters of the Roanoke River in the Commonwealth [of Virginia] . . . for the development of an additional public water supply by the City of Virginia Beach to provide water for itself and other communities in the southeastern region of the Commonwealth."

by federal authorities. Unlike North Carolina, the State *downstream* of the discharge of construction materials into Lake Gaston, Virginia has *no* protection under § 401(a)(2).

As discussed above, *Ouellette* establishes that Congress did not intend for "a number of different states to have independent and plenary regulatory authority over a single discharge." 479 U.S. at 496. If North Carolina were to succeed in usurping Virginia's § 401(a)(1) certification authority, then § 401 would give Virginia, the State where all relevant activities occur, no protection at all. That simply is not the law. It is a grossly twisted and distorted view of § 401 that North Carolina has adopted to stop the sorely needed public project, across the state line in Virginia – a project that North Carolina repeatedly acknowledged (before 1983) would cause no harm to its interests at all.

Thus it is clear that the Court of Appeals correctly decided this case, and the Court should deny *certiorari*.

Respectfully submitted,

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